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In the Supreme Court of the United States

October Term, 1962

No. 849

WILLIAM A. MOUSLEY and MAE E. MOUSLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 14) is reported at 311 F. 2d 795. The opinions of the District Court (R. 13a-15a, 466a-471a)[1] are reported at 194 F. Supp. 119 and 201 F. Supp. 510.

[1] "R." references are to the appendices filed by the parties in the Court of Appeals. Numbers followed by the letter "a" refer to pages in the appellant's appendix; numbers followed by the letter "b" refer to pages in the appellee's appendix and supplemental appendix.

JURISDICTION

The opinion of the Court of Appeals was filed on January 22, 1963. (Pet. 14.) The petition for a writ of certiorari was filed on February 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the statute of limitations barred prosecution for wilful attempted evasion of the payment of income taxes, assessed against the petitioners for the years 1942 through 1946, where the acts constituting the attempts to evade payment were the submission of fraudulent offers in compromise in 1955, 1956, and 1957.

2. In the trial of an indictment containing nine counts, was it reversible error to permit the jury to consider evidence and convict on a count as to which the trial court ultimately set aside the conviction for insufficiency of the evidence?

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.
>
> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the

offense, except that the period of limitation shall be 6 years—

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * * * *

(26 U.S.C. 6531.)

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201.)

Federal Rules of Criminal Procedure:

RULE 29. MOTION FOR ACQUITTAL.

* * * * *

(b) *Reservation of Decision on Motion.* * * * If the motion [for acquittal made at the close of all the evidence] is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. * * *

STATEMENT

On January 24, 1961, an indictment was returned in the Eastern District of Pennsylvania charging the petitioners, William A. and Mae E. Mousley, in nine counts, with violations of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954. Counts I-IV charged them with having wilfully attempted to evade payment of taxes assessed against them for the years 1942 through 1946 by filing false offers of compromise and accompanying financial statements with the District Director on January 26, 1955, and on May 17, 1956; by filing a false and fraudulent application for discharge of property from federal tax lien with the District Director on November 1, 1955; and by filing a false report of interests in real estate with the District Director on January 23, 1957. Count V charged them with violating Section 7206(1) by wilfully filing with the District Director on October 29, 1957, a verified statement of financial condition and other information, knowing it to be untrue and incorrect in that it did not disclose their interests in certain specified properties. Counts VI-IX charged them with understating net income in the amounts of $21,336.56, $27,066.85, $12,494.57, and $15,299.01, for the years 1954, 1955, 1956, and 1957, and wilfully attempting to evade and defeat $5,042.12, $8,289.41, $2,640.90 and $4,582.52 in income taxes for each of those years, respectively. (R. 5a-12a.)

The jury found petitioners guilty on all counts. (R. 464a.) The trial judge set aside the convictions

of the petitioners on Counts II and V (R. 466a-471a), and sentenced them on the remaining seven counts. Mr. Mousley was given concurrent sentences of six months imprisonment on Counts VI-IX, and two years probation on Counts I, III and IV. He was also given a $2,000 fine on each of the seven counts. Mrs. Mousley was sentenced to one year probation, and a $2,000 fine on each of the seven counts. (R. 3a.)

The Government's evidence showed that the petitioners, who were in the real estate business, owned many properties in the names of "straw" individuals. (R. 21b-36b, 50b-52b, 54b-60b.) A large number of these properties were not listed on the financial statements submitted by petitioners to the Service in connection with the offers in compromise which were the subject matter of Counts I, III and IV. (R. 109b-127b.) In addition, the petitioners failed to list these properties on their income tax returns for the years 1954 through 1957 and to report income received from them. This income, consisting of sales, rentals, and interest on long-term sales agreements, was shown to be $26,134.00 in 1954, $25,695.14 in 1955, $12,423.31 in 1956 and $13,722.81 in 1957. The income tax liability which the petitioners attempted to evade was shown to be $6,001.16 in 1954, $7,528.91 in 1955, $2,846.99 in 1956 and $3,983.57 in 1957. (R. 124a-140a.)

ARGUMENT

1. Petitioners assert (Pet. 9-10) that the statute of limitations barred prosecution for Counts I, III, and IV of the indictment, contending that the statute started to run on the dates the returns were filed. This contention is based on a misapprehension of the crimes charged in these counts.

Counts I, III, and IV charged the petitioners with attempting to evade *payment* of taxes, not with attempting to evade taxes. As the Ninth Circuit has recently pointed out, these are two entirely separate crimes. *Cohen* v. *United States*, 297 F. 2d 760, certiorari denied, 369 U.S. 865. In that case the defendant had been convicted in 1951 of attempting to evade his taxes for the years 1946 through 1948. *Cohen* v. *United States*, 201 F. 2d 386 (C.A. 9th). He was subsequently indicted for attempting to evade payment of these same taxes, and interposed the constitutional defense of double jeopardy. The court rejected this defense, holding that the statute creates two crimes, and that the acts necessary to constitute a violation of one are not the same as those necessary to constitute a violation of the other.

In the instant case the question whether the petitioners attempted to evade their taxes for the years 1942 through 1946 by filing false returns was not in issue. They were charged solely with attempting to evade payment of taxes by false statements made in the years 1955, 1956, and 1957 and not previously made on the petitioners' returns. It is clear, then, that each attempt to evade payment was a crime under Section 7201 of the 1954 Code,

and the six year statute of limitations began to run on the date of each attempt.[2]

2. The contention (Pet. 10-12) that it was reversible error to permit the jury to consider evidence submitted by the Government in support of a count of the indictment as to which the trial judge later granted a motion for acquittal is unsound. Acceptance of this view would make a mockery of the power of the trial judge under Rule 29(b), Federal Rules of Criminal Procedure, to grant a motion for acquittal after the jury has returned a guilty verdict. According to petitioners' contention, any time a trial judge, reviewing the evidence after the jury has returned a guilty verdict, decided that the verdict should be set aside as to one count, he would have to set it aside as to all counts, because the verdict would be "tainted" by the jury's consideration of the evidence introduced as to that count. There is no justification for attaching such consequences to Rule 29(b).

The cases relied upon by petitioners do not support them, for none of them involved a trial judge's order setting aside a jury verdict. In *Kotteakos* v. *United States*, 328 U.S. 750, the fatal error found by this Court was a variance between the indictment and the proofs, compounded by the trial court's failure to instruct the jury properly on the point.

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[2] *United States* v. *Beacon Brass Co.*, 344 U.S. 43, did not concern an indictment for wilful attempt to evade payment of a tax, and so has no application to the instant case. For the same reason *United States* v. *Bridell*, decided November 20, 1958 (No. 58 CR 475, N.D. Ill.) (Pet. 15-21), is not in point even assuming, *arguendo*, it was correctly decided.

The indictment charged one conspiracy, and it was found as a matter of law by the Court of Appeals (*United States* v. *Lekacos*, 151 F. 2d 170, 172 (C.A. 2)) that there were eight conspiracies, with different defendants being involved in the different conspiracies. The trial court instructed the jury there was one conspiracy, and so all evidence against one defendant was to be considered against all of the others. In *United States* v. *Long*, 257 F. 2d 340 (C.A. 3d), the improper evidence did not relate to any count in the indictment. In *United States* v. *Grady*, 185 F. 2d 273 (C.A. 7th), the Court of Appeals held that it was prejudicial for the affidavit attached to the information to go to the jury, as it might have operated to give undue weight to the allegations of the information.

CONCLUSION

For the reasons set forth above, the decision below was clearly correct. There is no conflict or other reason for further review. The petition should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

MARCH, 1963

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